INTERIOR BOARD OF INDIAN APPEALS

Morana Cheepo v. Acting Sacramento Area Director, Bureau of Indian Affairs

18 IBIA 131 (02/01/1990)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

MORANA CHEEPO
v.
ACTING SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-88-A Decided February 1, 1990

Appeal from a determination that the Sacramento Area Office, Bureau of Indian Affairs, lacked funds to purchase an access easement to a landlocked Indian allotment.

Affirmed.

1. Administrative Procedure: Burden of Proof--Indians: Lands: Ingress and Egress

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

APPEARANCES: Steven Hirsch, Esq., Oakland, California, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Morana Cheepo seeks review of a June 28, 1989, decision of the Acting Sacramento Area Director, Bureau of Indian Affairs (BIA; appellee), concerning a request to purchase an access easement to a landlocked Indian allotment in which appellant owns an undivided interest. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

On March 24, 1920, Frank Johnson, a Wuksachi Indian, received a trust patent to Allotment BIA No. Vis-49, NW¼ NE¼, E½ NW¼ sec. 26, T. 14 S., R. 26 E., Mount Diablo Meridian, Fresno County, California, containing 120 acres, more or less. The trust patent was issued under authority of the General Allotment Act, 25 U.S.C. §§ 334, 336 (1982). Johnson died in 1933, and the allotment is now owned by his heirs. Appellant owns an undivided 1/4 interest in the allotment.

Appellant states that access to the allotment was originally over an adjoining parcel. She further indicates that the allotment owners used an access road in common with the original public domain patentee of the adjoining parcel to run cattle, gain access to home sites, and for picnicking and horseback riding. There is no evidence of an express grant of an easement over the road.

The character of the surrounding land changed in the early 1970's when it was sold to a real estate developer. The adjoining parcel came into the possession of Henry and Rita DuFresne in 1977. In January 1977, appellant states that DuFresne erected a gate across the access road and reportedly threatened to shoot any Indian or BIA official trying to use the road.

BIA's assistance in dealing with DuFresne was sought by Maxine Wilcox (Wilcox), another owner of the allotment. In February 1978, Interior's Sacramento Regional Solicitor's Office (Regional Solicitor) informed DuFresne that the allotment owners had perfected a prescriptive right to use the road and demanded that DuFresne cease interfering with that right. There is no evidence that DuFresne complied with this demand.

On November 3, 1978, the United States, on behalf of the beneficial owners of the allotment, filed suit against DuFresne in the United States District Court for the Eastern District of California (United States v. DuFresne, Civ. No. F-78-220 MDC). The suit alleged that the allotment owners had a prescriptive right to use the access road and sought damages sustained by them as a result of DuFresne's interference with that right.

In early 1980, the Regional Solicitor and the United States attorney handling the Dufresne case met with Wilcox and her witnesses. As a result of that meeting, the Regional Solicitor determined that the facts as then related to him would probably not support a finding that the allottees had perfected a prescriptive easement. Furthermore, he felt that even if a prescriptive easement were found to exist, it would not permit the use of the allotment for grazing, the purpose for which Wilcox wanted to use the allotment. Accordingly, he suggested that the suit be voluntarily dismissed.

By memorandum dated May 23, 1980, the Department's Acting Associate Solicitor, Division of Indian Affairs, responded to the Regional Solicitor, stating at pages 1-2:

> We are bothered by the fact that there appears to be no access to the two parcels of allotted lands other than over the lands of the defendant. Should the litigation not be successful, whether prosecuted by the United States or the allottees on their own behalf, then the lands could well be rendered unuseable. While we have no quarrel with your legal analysis or predicted outcome, the possibility of no access to the lands gives us some pause.
>
> We urge that two steps be taken before voluntary dismissal is sought. If the Wilcoxes want to pursue a right-of-way through litigation, then they should be given the opportunity to intervene as a party plaintiff* so that the litigation is not dismissed in its entirety with the dismissal of the United States. Also, a

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* Our files do not contain a copy of the complaint. Therefore, we are unable to tell whether the Wilcoxes are already a party.

> commitment from the Bureau of Indian Affairs Area office should be explored that, if the litigation ultimately fails, the Bureau will make funds available for the condemnation of an easement. Under 40 U.S.C. 257 rights-of-way may be condemned by the United States if the acquisition is authorized by another statute. This office has previously advised the Bureau that the authorization for the acquisition of lands in the Indian Reorganization Act, 25 U.S.C. § 465, is sufficient to allow for the condemnation of a right-of-way for access to Indian lands.

On March 5, 1981, the United States voluntarily dismissed the action without prejudice. Although the record shows that the allottees were informed of their right to intervene, it does not show whether any of them did and, if so, what the result of the litigation was.

By letters dated February 3 and 27, 1989, appellant advised appellee of the history of the access problem and requested that BIA condemn or purchase an access easement. She informed appellee of the existence of a possible access route over the rear portion of another adjoining non-Indian parcel.

By letter of March 7, 1989, and decision of June 28, 1989, appellee informed appellant that BIA did not routinely receive Congressional appropriations for the purpose of condemning or purchasing access easements or other lands in trust status. He advised her that she should file a formal request with the Central California Agency, BIA, if she wished BIA to seek a special Congressional appropriation for funds to purchase an easement. 1/

Appellant filed such a request with the Central California Agency on July 21, 1989. She also filed a notice of appeal with the Board. Only appellant filed a brief on appeal.

Discussion and Conclusions

Appellant argues that the granting of a public domain allotment carries with it at least an implied right of access. In support of her position, appellant cites the General Allotment Act, 25 U.S.C. §§ 334, 336 (1982); the Federal trust responsibility; and numerous cases decided by both the Supreme Court and lower courts.

[1] In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence. Peall v. Acting Portland Area Director,

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1/ In his Mar. 7, 1989, letter to appellant, appellee stated that in 1986 BIA conducted a study of the problem of landlocked allotments. Pursuant to a Freedom of Information Act request, this information was furnished to appellant and is part of the administrative record. The information indicates that at that time, the problem of landlocked allotments was extensive, and had arisen, for the most part, because of some action taken in the past by BIA. There is no indication in the record whether any action, on either an individual or national level, was ever taken as a result of the study.

16 IBIA 163, 165 (1988), and cases cited therein. Although appellant continues to argue her legal right to an access easement, the agency action in this case is appellee's determination that he has no appropriated funds with which to purchase such an easement. Appellee has not, at this point, disputed appellant's legal argument. 2/ Because appellant has presented no evidence or argument indicating that appellee actually does have the funds to purchase an easement, the Board must affirm appellee's decision. See Kaibab Band of Paiute Indians v. Acting Phoenix Area Director, 15 IBIA 277, 283-84 (1987) (quoting Comptroller General Opinion No. B-198352 (June 22, 1981), holding that funds appropriated for aid to tribal governments could not be used to pay a Northern Paiute descendant who was inadvertently omitted from the Northern Paiute judgment fund payment roll); Aleutian/Pribilof Islands Association v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 10 IBIA 23 (1982) (appeal dismissed because of unavailability of appropriated funds for grants under the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (1982)).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the June 28, 1989, decision of the Acting Sacramento Area Director is affirmed. 3/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

2/ In fact, appellee's June 28, 1989, decision letter states at page 2:

"[W]hile the documents [in support of appellant's request] indicate statutory authority for condemnations and/or other land acquisitions for purposes of providing access to Indian lands, we have no funding available at this time that could be legally utilized for the purpose of purchasing the proposed easement * * *. [W]e do not routinely receive appropriations for land acquisition as authorized under [25 U.S.C. § 465 (1982)]."

3/ This decision in no way affects appellant's request for assistance from BIA in seeking a special Congressional appropriation for the purchase of an easement. This request is apparently still pending before BIA. Neither does it prevent BIA from seeking a legislative solution to the entire problem of landlocked allotments.